In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-239

HARRIOTT H. CHILDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This Memorandum is submitted in response to the order of this Court on December 11, 1972, requesting the United States to file a reply to the petition for rehearing.

1. After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of having knowingly possessed some forty pounds of marijuana with intent to distribute it, in violation of the Assimilative Crimes Act, 18 U.S.C. 13, incorporating Section 54-524.101(a) of the Code

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of Virginia.[1] She was sentenced to three years' imprisonment, all but six months of which was suspended. The court of appeals affirmed, 463 F. 2d 390 (C.A. 4), and this Court denied certiorari on October 24, 1972.

In the court of appeals and in this Court, petitioner contended that a subsidiary paragraph of the section of the Virginia Code under which she had been convicted was invalid as creating an irrational inference that falls under the rationale of *Leary* v. *United States,* 395 U.S. 6. Under that provision, which has been repealed by the 1972 Virginia General Assembly, a conviction for violating Section 54–524.101(a) could be "based solely upon evidence as to the quantity" of any controlled substance possessed. The United States Court of Appeals for the Fourth Circuit held that it was unnecessary to pass upon the validity of this Virginia provision since the trial judge, in his final instructions setting forth the elements of the crime and the proof required to establish them, told the jury that it could infer intent to distribute the marijuana from all the evidence in the case, including the amount of marijuana possessed. The court concluded that the district judge "did not rest his instruction on the sufficiency of proof of intent to distribute on the statutory standard, *i.e.,* 'solely upon evidence of the quantity'," 463 F. 2d at 393. In our opposition to certiorari we pointed out that, in addition to the other evidence

[1] The offense occurred within the special territorial jurisdiction of the United States (Washington National Airport).

properly before the jury regarding intent to distribute, the quantity of marijuana in petitioner's possession—enough for many thousands of marijuana cigarettes—would itself rationally warrant an inference of intent to distribute without regard to the challenged paragraph in the Virginia Code.

2. In her petition for rehearing, petitioner relies upon the decision of the Virginia Supreme Court in *Sharp* v. *Commonwealth,* 192 S.E. 2d 217, decided October 9, 1972, holding the challenged portion of Section 54–524.101(a) unconstitutional because of vagueness and because it created an arbitrary inference under the standards of *Leary.*[2]

When petitioner filed her original typewritten petition for rehearing on November 16, 1972, we noticed that the last page of the opinion in *Sharp* v. *Commonwealth, supra,* in her Appendix had not been included. We promptly notified the Clerk of this Court of this omission and on November 20, 1972, in response to the Clerk's inquiry, petitioner's counsel supplied the missing page, to be attached to the typewritten petition for

[2] The court based its vagueness ruling on the fact that Virginia law also punishes as a misdemeanor the mere possession of marijuana without an intent to distribute: "a person of ordinary intelligence in possession of a quantity of marijuana could not with reasonable certainty know whether he was guilty of the misdemeanor * * * or the felony * * *" (192 S.E. 2d at 218). The Fourth Circuit in this case noted that the challenged provision might be vague but pointed out that this would not affect the validity of the substantive offense created by the statute, 463 F. 2d at 392. The Virginia Supreme Court, in remanding the *Sharp* case for a new trial, reached the same conclusion. 192 S.E. 2d at 219.

rehearing. However, on November 24, 1972, petitioner replaced the typewritten copies by serving printed copies of her petition for rehearing [3] and again the last page of the *Sharp* opinion was not included. We again informed petitioner's counsel of this and were assured that petitioner would promptly file superseding printed copies containing the missing page.[4] Three weeks later, on December 14, 1972, after this Court had called for the government's response on December 11, 1972, petitioner filed and served these superseding copies.

Since we believe that the omitted portion of the *Sharp* opinion, which specifically discusses and distinguishes the present case, shows that the petition for rehearing should not be granted and since this portion of the opinion may not have been before the Court, we quote it in its entirety:

* * * * *

> "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

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[3] We understand that these printed copies were distributed to the Court.

[4] Since this Court's Rule 58(3) does not permit the filing of a response to a petition for rehearing, unless requested, we advised the Clerk by telephone that possibly pertinent material was missing from the printed rehearing petition and that counsel informed us that the omission was a clerical oversight that would be corrected by substitution of new petitions.

> The case of *United States* v. *Childs*, —— F.2d —— (4th Cir., 1972) is distinguishable from the case at bar. There, although the instruction was based on § 54–524.101(a), the trial judge specifically instructed the jury that possession of a large quantity of marijuana may be considered *among all other relevant facts and circumstances* to infer intent to distribute, but that the jury was not required to infer from the evidence that the defendant intended to distribute it. [Emphasis in court's opinion.]
>
> In the instant case, Instruction No. 5, which told the jury that a conviction of possession of marijuana with intent to distribute may be based *solely* upon evidence as to quantity, improperly emphasized quantity alone and permitted the jury to disregard other facts and circumstances relating to intention. We hold that the instruction was erroneously given.
>
> Accordingly, the judgment of the trial court will be reversed. However, our holding that the subsidiary provision of Code § 54–524.101(a) is unconstitutional does not affect the validity of the substantive offense created by the statute. The case will, therefore, be remanded for a new trial.
>
> *Reversed and remanded.*

There is thus no reason to grant the petition for rehearing. As the above quotation from *Sharp* reveals, the Virginia Supreme Court itself considered petitioner's case correctly decided because the district court had not permitted the jury to rely on the challenged portion of Section 54–524.101(a), but had, in the words of the Fourth Circuit in this case,

"employed the standard of proof of intent normally to be applied in the absence of any statutorily authorized inference" (463 F. 2d at 393). Thus, as both the Fourth Circuit here and the Virginia Supreme Court in *Sharp* concluded, petitioner's conviction was not affected by the statutory inference in Section 54–524.101(a). Whether or not the Virginia Supreme Court was correct in ruling unconstitutional one (previously repealed) provision in a state statute, both that court and the court below properly concluded that the possible invalidity of that provision does not taint the jury's verdict in the present case.

It is therefore respectfully submitted that the petition for rehearing should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.

DECEMBER 1972.

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